Office-Supreme Court, U.S.
FILED
MAY 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-5298

in the Supreme Court of the United States

OCTOBER TERM, 1982

ANDRES SEGURA AND LUZ MARINA COLON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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PETITION FOR CERTIORARI FILED AUGUST 27, 1982,
CERTIORARI GRANTED FEBRUARY 22, 1983.

QUESTION PRESENTED

The issue on which Certiorari was granted is "[w]hether the introduction into evidence of contraband seized after a 19-hour hiatus between the illegal entry into and seizure of Petitioner's dwelling and the obtaining of a search warrant violates the Constitutional requirement that a magistrate find probable cause and issue a warrant *before* the police violate the privacy of the home?" (emphasis in the original)

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OPINION AND JUDGMENTS BELOW

The opinion of the Second Circuit Court of Appeals is reported at *United States v. Segura*, 633 F.2d 411 (2nd Cir. 1981) and is reproduced at Joint Appendix, Pages 17-27. The opinion of the United States District Court for the Eastern District of New York (John R. Bartels, District Judge) is unreported and is reproduced at Joint Appendix Pages 3-16.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment IV Provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc., (hereinafter "NACDL") is a District of Columbia non-profit corporation founded in 1958. More than 2,000 lawyers drawn from every state are members. The NACDL membership is in daily contact with the criminal justice system as advocates, law professors or judges of our state and federal courts. The NACDL is affiliated with the American Bar Association and is

awarded full representation in the ABA House of Delegates. One of the NACDL's stated objectives is to promote the proper administration of justice through its concern with the protection of individual rights and the improvement of the criminal law and its practices and procedures.

SUMMARY OF ARGUMENT

Privacy in the home is a core interest protected by the Fourth Amendment and, as such, has received and continues to deserve rigorous protection by this Court. The seizure of the Petitioners' apartment was a seizure of its contents. It matters little whether the agents rummaged through the apartment or whether they just merely "secured" it, taking note of what they would later seize under the warrant. The invasion of privacy interests protected by the Fourth Amendment occurred at the point of impoundment, not upon the subsequent seizure under the warrant. The later issuance of the warrant by the magistrate cannot cure the prior unlawful seizure.

Suppression of evidence first seized without a warrant and later re-seized pursuant to one is required to vindicate the right of privacy and will enhance Fourth Amendment values. This case cannot turn on whether the unlawfully seized evidence was used to obtain the warrant. Only suppression of all the evidence seized will deter police entries of this nature.

FACTS

Amicus Curiae adopts the statement of facts set forth in Petitioners' Brief.

ARGUMENT

THE EVIDENCE SEIZED UNDER THE SEARCH WARRANT SHOULD BE SUPPRESSED

The Second Circuit Court of Appeals held the search warrant issued by the Magistrate in this case to be valid, *United States v. Segura*, 633 F.2d 411, 414 (2nd Cir. 1981). Amicus curiae does not challenge that conclusion. To the Second Circuit, the issuance of the warrant was sufficient to validate the search and seizure under the authority of it irrespective of the unreasonableness of the entry into the apartment in the first instance. (Id. at 416-417). To reach its result, the Second Circuit had to proceed on two assumptions: that the warrantless entry into and impoundment of the apartment was not a seizure of its contents and, that the warrant somehow sufficiently intervened into the agents' continuous unlawful possession of the contents of the apartment to purge the taint of the initial seizure. The District Court put the focal issue well: [t]he real problem in this case is the effect of the search warrant issued after the premises were illegally secured." (Joint Appendix at 13). The Second Circuit based its result exclusively on its earlier decision in *United States v. Agapito*, 620 F.2d 324 (2nd Cir. 1980) *cert. denied* 449 U.S. 834 (1980). *Agapito* was a case factually similar to this in which DEA agents unlawfully entered the defendants' hotel room after arresting them in the hotel lobby. After holding possession of the room for almost 24 hours, the agents obtained a warrant and, on authority of the warrant, opened a suitcase they had seized, but had not opened, on their initial unlawful entry. After finding an untainted residue of information in the warrant sufficient to meet the probable cause

standard, the Court, without further discussion, sustained the seizure of drugs found in the suitcase.

Agapito, as in this case, is notable for the lack of discussion of the issue of whether the execution of the lawful warrant was tainted by the agents' prior unlawful entry into an area in which the defendants had justifiable expectations of privacy. *United States v. Agapito*, *supra*, 620 F.2d at 333-338; *United States v. Segura*, *supra*, 663 F.2d at 414. Citation by the *Agapito* panel to Mr. Justice Powell's dissent in part in *United States v. Giordano*, 416 U.S. 505, 554-556, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), and to the opinion in *Parts Mfg. Corp. v. Lynch*, 129 F.2d 841, 842-843 (2nd Cir. 1942), *cert. denied*, 317 U.S. 674 1942) and *United States v. Cognato*, 408 F. Supp. 1000, 1005 (D. Conn. 1976). Affd. 539 F.2d 703 (2nd Cir. 1976), *cert. den.*, 430 U.S. 956 (1977), makes it reasonably apparent that under the Second Circuit's rationale, if no tainted evidence is used to obtain the warrant, whatever transpired prior to its issuance is a constitutional irrelevancy. *United States v. Agapito*, *supra*, 620 F.2d at 638.

The Second Circuit's apparent reluctance to describe its result in the language of the attenuation cases strongly suggests that this case resembles but does not tightly fit that mold. This clearly is not a case where illegally gathered primary evidence leads to and taints other evidence. *See*, *United States v. Crews*, 445 U.S. 463, 470-471, 100 S.Ct. 1244, 1249, 1250, 63 L.Ed.2d 537 (1980). 3 LaFave, *Search and Seizure*, Ch. 11.4 at P. 612 (1978). The officers apparently had probable cause to obtain a warrant, did not get one, and then impounded Petitioner's apartment and held it for some 19 hours

before obtaining the warrant and seizing evidence under the authority of it. By treating the question raised in this case as a "use" problem the Second Circuit has misdirected the inquiry. Proper analysis requires resolution of whether the Petitioners' protected Fourth Amendment interests were invaded by the agents and if so, whether preservation of Fourth Amendment values calls for suppression of all the evidence seized. The analytical model employed by the Second Circuit to decide this case is insufficient because it ignores consideration of these two factors which are the heart of the suppression cases.

> " . . . considerations relating to the exclusionary rule and the constitutional principles must play a factor in attenuation analysis. . . . The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purpose which the law is to serve." *United States v. Ceccolini*, 435, U.S. 268, 279, 98 S.Ct. 1054, 1061-1062, 55 L.Ed.2d 268 (1978).

It is the relationship between the unlawful impoundment and the seizure under the warrant that must occupy center stage. By drawing a distinct line between suppression and admission at the use and exploitation of the evidence illegally seized on the first search and the valid warrant as the predicate for the second, the Second Circuit created a *per se* rule under which the later search and seizure under authority of the warrant will always be lawful. *See, United States v. Agapito, supra*, 620 F.2d at 338.

This Court has on several occasions rejected the logic that the later adherence to one constitutional right will, of its own force, cure an earlier deprivation of another. In *Brown v. Illinois*, 422 U.S. 590, 601-603, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), this Court refused to accept the argument that giving *Miranda* warnings will alone s[illegible]ciently sanitize a confession made during a period of detention resulting from an unlawful arrest. Instead, the Court viewed the admissibility of the Mirandized confession "in light of the distinct policies and interests of the Fourth Amendment", 422 U.S. at 602:

> "If Miranda warnings, by themselves were held to attenuate the taint of an unlawful arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially deleted. . . . Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a 'cure-all' and the constitutional guarantee against unlawful search and seizures could be said to be reduced to 'a form of words'. *Brown v. Illinois, supra*, 422 U.S. 602-603.

In *Dunaway v. New York*, 442 U.S. 200, 217-219, 99 S.Ct. 2248, 60 L.Ed.2d 824, (1979) and *Taylor v. Alabama*, ___ U.S. ___, 102 S.Ct. 2664, 2669, ___ L.Ed.2d ___, (1982), the Court followed *Brown* and held that the question of suppression must be viewed in light of the interests the Fourth Amendment is designed serve and the deterrent purposes of the exclusionary rule. Viewed from this perspective, the Second Circuit simply pulled up too short. Notwithstanding the intervention

of the warrant, application of established Fourth Amendment principles compels the conclusion that the evidence taken by the DEA agents under authority of the warrant should be suppressed.

A. The Privacy Interest Asserted in this Case Is Exceptionally Strong

A long unbroken line of this Court's decisions hold simply and directly that the Fourth Amendment requires a warrant to be secured prior to the entry and search of an individual's home unless certain well-defined and narrow exigent circumstances are found to be present. *Steagald v. United States*, 451 U.S. 204, 101 S.Ct. 1642, 1647, 68 L.Ed.2d 38 (1981); *Payton v. New York*, 445 U.S. 573, 583-590, 100 S.Ct., 1371, 63 L.Ed.2d 639 (1980); *Mincey v. Arizona*, 437 U.S. 385, 391-395, 98 S.Ct. 2408, 57 L.Ed.2d, 290 (1978); *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443, 481, 91 S.Ct. 2022, 2045, 20 L.Ed.2d 564 (1971); *Vale v. Louisiana*, 399 U.S. 30, 33-34, 90 S.Ct. 1969, 26 L.Ed.2d 209 (1970); *McDonald v. United States*, 335 U.S. 451, 455-456, 69 S.Ct. 191, 93 L.Ed. 153 (1948); *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948); *Boyd v. United States*, 116 U.S. 616, 625 6 S.Ct. 524, 529, 29 L.Ed. 746 (1886). Lasson, *The History and Development of The Fourth Amendment to the Constitution of the United States*, 4th Ed. (1970) at 120. "Physical entry into the home," in this Court's words, "is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court, supra*, 407 U.S. at 313.

> "In terms that apply equally to seizures of property and to seizures of person, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. *Payton v. New York, supra,* 445 U.S. 590.

B. The Evidence Was Seized at the Time the Apartment Was Impounded, Not at the Time the Warrant Was Executed

Granting probable cause for the issuance of the warrant and assuming regularity in all other respects, the narrow question is whether the seizure took place under it or under the prior unlawful entry by the DEA agents. It is clear that seizure, not use, is the operative Fourth Amendment factor. *Florida v. Royer,* ___ U.S. ___ 103 S.Ct. 1319, ___ L.Ed.2d ___ (1983). This Court has most recently stated: "if there is no detention – no seizure within the meaning of the Fourth Amendment – then no constitutional rights have been infringed." *Florida v. Royer, supra,* ___ U.S. ___, 103 S.Ct. at 1324.

The decisions define the word "seizure" functionally. Giving the literal import of the word its due, this Court held in *Florida v. Royer, supra,* n.9, ___ U.S. at ___, 103 S.Ct. at 1327, that Royer's property was seized when the police took possession of it without his consent. *See also, Hale v. Henkel,* 201 U.S. 43, 26 S.Ct. 370, 379, 50 L.Ed. 652 (1906): ["... a seizure (of papers) contemplates a forcible dispossession of the owner. ..."]; *Colorado v. Banister,* n.3, 449 U.S. 1, 4, 101 S.Ct. 42, 65

L.Ed.2d 1 (1980): [". . . the stopping of a vehicle and the detention of its occupants constitute a seizure. . . ."]; *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980): [person "seized" when "reasonable person would have believed that he was not free to leave."]; *United States v. Shaefer, Michael & Clairton*, 637 F.2d 200, 202 (3rd Cir. 1980): [weigh bills "obtained" from truck driver by police and "photocopied and later returned" were seized]; *United States v. Thomas*, 613 F.2d 787, 793 (10th Cir. 1980); ["(a) 'seizure' is taking of property . . . [it] involves 'a forcible or secretive dispossession' "]; *United States v. Lisk*, 552 F.2d 228, 230 (7th Cir. 1975): [seizure is taking of property]; *United States v. Haden*, 397 F.2d 460, 465 (7th Cir. 1968): [seizure involves forcible or secretive dispossession].

Applying the functional definition of seizure to the facts of this case, it is evident that Petitioner's apartment, and everything in it, was seized if not on the agents' initial entry, then during their continued unreasonable nineteen-hour possession of it. After the agents entered the apartment, they separated Petitioners from their property and asserted full dominion and control over it. The agents continuously occupied the apartment for nineteen hours to "secure" it, i.e., to hold it against all others. It is hard to imagine under these circumstances that Petitioners could remove, use or even touch any item of property in the apartment. Indeed, when Petitioner Colon requested her handbag, the officers rifled through it and removed its contents.

Very recently, in *United States v. Ross*, ___ U.S. ___, 102 S.Ct. 2157, 2170 ___ L.Ed.2d ___ (1982), this Court noted in sustaining a search that:

> "A lawful search of a fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. . . .
>
> When a legitimate search is underway and where its purpose and its limits have been precisely defined, nice distinctions between closets, drawers and containers . . . must give way to the prompt and efficient completion of the task at hand."

Just as Petitioners are entitled to no such "nice distinctions" when the search is lawful, the police are similarly not entitled if the search is unlawful. The "container" unlawfully seized was Petitioners' home. Everything in it was simultaneously seized.

As the officers' possession of the apartment, and the items in it, was continuous, exclusive, forceful and adverse to the Petitioners' interest in those items, the apartment and its contents were clearly seized.

C. Suppression of All the Evidence Seized is Required

The next question is whether the search warrant broke the casual chain of illegality. As noted, the Second Circuit viewed the issuance of the warrant as the end-all of this case. Under the Second Circuit's rationale

the deterrence aspect of Fourth Amendment jurisprudence is lost. According to the Second Circuit, as long as anything taken in the illegal search was not used to obtain the warrant, the unlawful break-in is irrelevant.

The test for measuring "the point at which the detrimental consequences of illegal police action becomes so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost," *Brown v. Illinois, supra*, 422 U.S. at 607, (Powell, J., concurring in part), is that of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963):

> "The . . . question in such a case is 'whether granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation or instead by means sufficiently distinquishable to be purged of the primary taint'" *Id.*, at 487-488.

In *Brown v. Illinois, supra*, the Court articulated factors to which it would look to determine whether the illegality had been sufficiently severed to purge the "primary taint". In *Brown*, the defendant was held in custody as a result of an illegal arrest and while held gave inculpatory statements which were used against him at trial. The Supreme Court of Illinois held that the giving of *Miranda* warnings to defendant made the statements sufficiently voluntary to purge the taint of the arrest. This Court reversed, holding that the voluntariness of the statements was merely the beginning of the inquiry.

". . . *Miranda* warnings thus far have not been regarded as a means of remedying or detering violations of Fourth Amendments or rights. . . . The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies distinct from those it serves under the Fifth. *It is directed at all unlawful searches and seizures, not merely those which happen to produce incriminating or material testimony as fruits." Brown v. Illinois, supra,* 422 U.S. at 601, (emphasis added).

Whether taint may be removed, according to *Brown*, is measured by the "temporal proximity" between the constitutional violation and the evidence sought to be suppressed, "the presence of intervening circumstances" and, "particularly, the purpose and flagrancy of the official misconduct." *Brown v. Illinois, supra,* 422 U.S. 603-604.

1. *Temporary Proximity*

The impoundment of Petitioners' apartment for an unreasonably long period of time without any measurable attempt to obtain a warrant was not relevant to the Second Circuit.

Certainly, the length of a warrantless occupation bears on its reasonableness. *Florida v. Royer, supra,* ____ U.S. ____, 103 S.Ct. at 1328-1329. An intrusion of even short duration may constitute a seizure. *United States v. Brignoni-Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Terry v. Ohio,* 392 U.S. 1, 16-19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The District

Court rightly focused on the length of the warrantless occupation of Petitioners' apartment. The District Court held that the "18-20 hour delay in the issuance of the warrant, during which the agents remained in illegal possession of the premises, rendered the execution of the warrant unreasonable. . . ." (Joint Appendix at 15). Thus, even if the warrant's *issuance* is viewed apart from the unlawful entry and impoundment, the two became enmeshed, as the District Court correctly observed, at the point of *execution*. The taint of the illegal occupation of the apartment cannot dissipate when the very evidence re-seized under the warrant is present and available for that re-seizure through the initial unlawful warrantless seizure. Evidence unlawfully taken in the first instance cannot be "held" by police to be later re-seized under a warrant. *Florida v. Royer*, *supra*, ___ U.S. ___, 103 S.Ct. at 1327. Circular argument of this nature has repeatedly been rejected by this Court. *See, e.g., Johnson v. United States*, *supra*, 333 U.S. at 16-17: [". . . the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do."] The District Court's point seemed to have been missed by the Court of Appeals. It was the unlawful preservation of evidence for seizure that concerned the District Court when it stated that "[t]he evidence would not inevitably have been discovered . . . Colon might well have destroyed it." (Joint appendix at Page 15).

In sum, whatever might be said for a brief intrusion into the apartment or for a short detention of property cannot be said in this instance. The illegality of a warrantless impoundment of property magnifies geometrically with the passage of time because of the

requirement that the warrant precede, not follow, the entry and seizure. When property is unlawfully held by the authorities for an unreasonably long time, the ability to rummage uncontrolled through the owner's private personal effects and possessions also magnifies geometrically.

2. *Intervening Circumstances*

The warrant added nothing to what was already done. The agents were in possession of Petitioners' property to the exclusion of Petitioners' rights to do it. All the warrant could do was authorize a re-seizure of what was already in the agents possession. The warrant and magistrate serve their function before a search and seizure, not after it. *McDonald v. United States, supra*, 335 U.S. 445-456; *Johnson v. United Stated, supra*, 33 U.S. In this regard, it is well to cite here the observation of Mr. Justice Douglas in *McDonald v. United States, supra:*

> "The Fourth Amendment . . . marks the right of privacy as one of the unique values of our civilization. . . . The presence of a search warrant serves a high function . . . The right of privacy was deemend too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." 335 U.S. at 453, 455-456.

3. *Purpose and Flagrancy*

Flagrancy lies at the core of this case. The entry into and the impoundment of Petitioners' apartment

was inexcusable. In doing it the DEA agents not only violated the Petitioners' rights, but also violated the express unambiguous instructions of their superior. It has been suggested that the more flagrant a violation of the Fourth Amendment, the more the need for suppression of evidence. *Brown v. Illinois, supra*, 422 U.S. at 604-605; 3 LaFave, *Search and Seizure*, Ch. 11.4 at p. 616. Here, there can be no question on this record that the break-in was an intentional, bad faith infringement of the Petitioners' rights. The agents apparently had probable cause to obtain a warrant throughout the entirety of this transaction and neither presented any rational excuse for not obtaining one nor came within any exception to the warrant requirement.

4. ***Suppression of the Evidence Seized under Authority of the Warrant Will Serve the Purpose of the Exclusionary Rule***

The purpose of the exclusionary rule has frequently been commented upon by this Court.

> "The Court in *Wong Sun*, as is customary, emphasized that application of the exclusionary rule on Toy's behalf protected Fourth Amendment guarantees in two respects: 'in terms of deterring lawless conduct by federal officers,' and by 'closing the doors of the federal courts to any use of evidence unconstitutional obtained.' Ibid. **These considerations of deterrence and of judicial integrity, by now, have become rather commonplace in the Court's cases. See, e.g., United States v. Peltier, 422 U.S. 531, 535-538, 95 S.Ct. 2313, 2316-2318, 45 L.Ed.2d 374; Untied States v. Calandra, 414**

U.S. 338, 347, 94 S.Ct. 613, 619, 38 L.Ed.2d 561 (1974); Terry v. Ohio, 392, U.S. 1, 12-13, 28-29, 88 S.Ct. 1868, 1875, 20 L.Ed.2d 889 (1968). 'The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' " Elkins v. United States, 364, U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960). *Brown v. Illinois, supra*, 422 U.S. at 599-600.

Keeping the purpose of the rule in focus, the factors specific to this case strongly suggest its application. No mere innocent, unknowing or technical violation of the Fourth Amendment is involved. Centrally implicated is whether the police may unlawfully break into the homes of citizens. The right of privacy is a concept central to the American value system and has been institutionalized in this Court's decisions for almost one hundred years. The right of privacy has been described as "indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; [it is] to be regarded as the very essence of constitutional liberty.' " *Gouled v. United States*, 255 U.S. 298, 302, 304, 41 S.Ct. 261, 65 L.Ed. 647 (1920). **To allow this very fundamental American idea to be eroded because the evidence derived from a police break-in is not used in some fashion against a defendant in a criminal case perceptibly depreciates a concept that historically has made our society measurably different and measurably better than others. It may be reasonably assumed that run of unlawful police entries into the home will be clandestine, professional affairs designed not to be**

discovered and not to turn up evidence to be used, but to confirm suspicions of criminality or even the existence of probable cause. Application of the doctrinal basis of the Second Circuit's decision in this case would allow confirmatory searches as long as nothing seen or taken is "used". Predicating enforcement of Fourth Amendment values on use, rather than upon a determination of whether a search or seizure occurred and whether a warrant was required, will vest the police with unbridled discretion to invade the most private sanctuaries of the innocent and the guilty alike.

CONCLUSION

Application of existing Fourth Amendment doctrine as articulated by this Court should result in suppression of all the evidence seized in this case. Suppression of the evidence seized is a result consonant with established principles of Fourth Amendment jurisprudence. A decision favoring the Government would severely undermine values lying at the core of the Fourth Amendment; would stand the warrant clause on its ear; and, would encourage unlawful secret confirmatory searches.

Respectfully submitted,

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